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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 DOUGLAS JOHN MARTIN TOBIN,
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12 Plaintiff,

13 v.

14 STATE OF WASHINGTON AND PIERCE
15 COUNTY,

16 Defendants.

No. 08-5591RJB/JRC

REPORT AND RECOMMENDATION

NOTED FOR:
June 5, 2009

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18 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned
19 Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrate
20 Judges' Rules MJR 1, MJR 3, and MJR 4. Plaintiff paid the filing fee and is not proceeding *in*
21 *forma pauperis*. Plaintiff had the burden of properly serving the summons and complaint in this
22 case. Plaintiff named the State of Washington and Pierce County as defendants. The County has
23 not appeared.

24 On March 31, 2009, the Court entered an Order to Show Cause directing plaintiff to show
25 what steps he had taken to serve Pierce County (Dkt. # 16). On April 9, 2009, plaintiff filed a
26 return of service showing that a Mr. Goforth attempted to serve this action by leaving a copy of
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1 the summons and complaint with the Pierce County Prosecutor's Office at 930 Tacoma Ave.
2 South Room 946, Tacoma, Washington.

3 This does not constitute proper service. The Rule controlling service on a state or local
4 government entity such as a county is Fed. R. Civ. P. 4(j)(2). A county may be served by leaving
5 a copy of the summons and complaint with the "chief executive officer" of the county or in the
6 manner provided by state law. Under Washington State Law service on a County is
7 accomplished by serving the County Auditor or, if it is normal business hours, by serving the
8 Deputy Auditor. *See*, RCW 4.28.080.

10 DISCUSSION

11 This action was commenced October 2, 2008. Fed. R. Civ. P. 4(m) indicates that if
12 service of a summons and complaint is not made within 120 days of filing the court shall dismiss
13 without prejudice unless the plaintiff can show good cause why service was not made within that
14 time. Ignorance of the rules is not good cause. Townsel v. County of Contra Costa, 820 F.2d
15 319, 320 (9th Cir.1987). Plaintiff had until January 30, 2009 to properly serve the County. The
16 above analysis and a plain reading of the rule would appear to indicate that dismissal without
17 prejudice is in order.

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19 The 9th Circuit has held that failure to comply with the service requirements does not
20 mandate dismissal and that the rule should be given liberal and flexible construction so long as
21 the defendant receives sufficient notice of the complaint. United Food & Commercial Workers
22 Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984). Failure to follow technical
23 requirements does not warrant dismissal where "(a) the party that had to be served personally
24 received actual notice, (b) the defendants would suffer no prejudice from the defect in service,
25 (c) there is a justifiable excuse for failure to serve properly, and (d) the plaintiff would be
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1 severely prejudiced if his complaint were dismissed.” Borzeka v. Heckler, 739 F.2d 444, 447
2 (9th Cir. 1984).

3 The federal approach differs sharply from Washington State’s approach. Under state law
4 the requirement to serve a certain person is construed narrowly. Even service on the chief
5 executive’s secretary does not fulfill the obligation to serve the County Auditor. Nitardy v.
6 Snohomish County, 105 Wash 2d. 1008, 959 P. 2d 127 (1986).

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8 In this case, the county has not appeared at all. The court cannot say the county is aware
9 of the action or that the county would not be prejudiced if the action were to go forward.
10 Plaintiff is not severely prejudiced given that there is a Report and Recommendation to dismiss
11 the action based on *res judicata* pending. Accordingly, Pierce County should be DISMISSED
12 WITHOUT PREJUDICE.

13 CONCLUSION

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15 This Court recommends that Pierce County be **DISMISSED WITHOUT PREDUDICE**
16 for failure to properly serve the County. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the
17 Federal rules of Civil Procedure, the parties shall have ten (10) days from service of this Report
18 to file written objections. *See also*, Fed. R. Civ. P. 6. Failure to file objections will result in a
19 waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985).
20 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for
21 consideration on **June 5, 2009**, as noted in the caption.

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23 DATED this 6th day of May, 2009.

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J. Richard Creatura
United States Magistrate Judge